IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.15029 of 2005
Date of decision:30.10.2006

M/s. Shree Bhagwati Steel Rolling Mills

....Petitioner

versus

Commissioner of Central Excise and another

....Respondents

CORAM: HON'BLE MR. JUSTICE ADARSH KUMAR GOEL
HON'BLE MR. JUSTICE RAJESH BINDAL

Present: Mr. Jagmohan Bansal, Advocate, for the petitioner.

Mr. Gurpreet Singh, Central Govt. counsel, for the respondents.

**JUDGMENT:**

This writ petition seeks quashing of letter dated 19.8.2005, Annexure P.2 requiring the petitioner to pay interest for the delayed payment of the Central Excise Dues.

Case of the petitioner is that it took a rolling mill on lease for the period from 1997 to 2000 and manufactured re-rolled non-alloy steel products. On 1.9.1997, Compounded Levy Scheme was introduced by way of section 3-A of the Central Excise Act 1944 (for short, the Act). The petitioner opted for compounded levy under Rule 96ZP of the Central Excise Rules, 1944 (for short, 'the Rules'). On expiry of period of lease, the petitioner surrendered its registration certificate on 1.6.2000. Thereafter on 19.8.2005, the impugned notice was issued to the petitioner demanding interest for the delayed payment of duty due for the period 1997-2000.

Learned counsel for the petitioner submitted that since the compounded levy scheme had come to an end, liability incurred thereunder by the petitioner did not survive. Reliance has been placed on judgment of the Hon'ble Supreme Court in **Messrs Rayala Corporation (P) Limited and MR Pratap v. Director of Enforcement, New Delhi**, 1969(2) SCC 412 and **Kolhapur Canesugar Works Limited v. Union of India**, 2000 (119) ELT 257(SC), for the proposition that omission of a provision does

not amount to repeal and does not attract Section 6 of the General Clauses Act, 1897, which is an exception to the general rule that deletion of a provision brings all proceedings to an end unless a saving clause is enacted.

It was next submitted that demand of interest has to be made within reasonable period and after expiry of reasonable period, the demand must be held to be barred by limitation. Reliance has been placed on judgments of the Hon'ble Supreme Court in **Government of India v. Citedal Fine Pharmaceuticals,** 1989(42) ELT 515 and **Commissioner of Trade Tax, Lucknow v. Kanhai Ram Thekedar,** 2005(185) ELT 3.

In the reply filed, stand taken is that the partners of the petitioner firm gave affidavit dated 26.6.2000 undertaking to pay Central Excise Duty alongwith interest and last payment of duty was deposited by the petitioner on 31.3.2003. Thereafter, demand notice in respect of interest was given within less than three years.

Learned counsel for the revenue submitted that omission of compounded levy scheme did not affect operation of the said scheme prior to its omission. It was submitted that the scheme was not introduced merely by rule but under section 3-A of the Act, which was not a 'temporary statute'. Judgments relied upon are in respect of provisions of rules or temporary statutes to which Section 6 of the General Clauses Act was held to be not applicable. The said judgments have also been distinguished on the ground that provisions in the Central Excise Act and Rules for recovery of the amounts which had become due, existed and, therefore, it could not be submitted that relevant provisions having been omitted without re-enactment of any corresponding provision, the liability for the dues no longer survived.

It was further submitted that plea of inordinate delay in raising the demand for interest could not be entertained as the question whether the delay was “unreasonable” depended on facts of an individual case. In the present case, demand was within reasonable time. Reliance was placed on judgment of the Hon'ble Supreme Court in **Citedal Fine Pharmaceuticals's** case (supra).

We have considered the rival submissions and perused the record.

From the contentions raised by both the parties, following

questions arise for consideration:-

(i) Whether omission of compounded levy scheme wipes out the liability of the assessee for the period during which the scheme was in operation?

(ii) Whether letter of demand of interest for delayed payment was liable to be set aside on the ground of delay?

Before proceeding further, we may notice the relevant provisions of section 3-A of the Act:-

"**3A. Determination of annual capacity of production of the factory for levy of Excise duty** – (1) Notwithstanding anything contained in Section 3, where the Central Government, having regard to the nature of the process of manufacture or production of excisable goods of any specified description, the extent of evasion of duty in regard to such goods of such other factors as may be relevant, is of the opinion that it is necessary to safeguard the interest of revenue, specify, by notification in the Official Gazette, such goods as notified goods and there shall be levied and collected duty of excise on such goods in accordance with the provisions of this section.

(2)where a notification is issued under sub-section (1), the Central Government may, by rules, -

(a) provide the manner for determination of the annual capacity of production of the factory, in which such goods are produced, by an officer not below the rank of Assistant Commissioner of Central Excise and such annual capacity shall be deemed to be the annual production of such goods by such factory; or

(b) (i) specify the factor relevant to be production of such goods and the quantity that is deemed to be produced by use of such factor; and

(ii) provide for the determination of the annual capacity of production of the factory in which such goods are produced on the basis of such factor by an officer not below the rank of Assistant

Commissioner of Central Excise and such annual capacity of production shall be deemed to be the annual production of such goods by such factory:

Provided that where a factory producing notified goods is in operation only during a part of the year, the annual production thereof shall be calculated on proportionate basis of the annual capacity of production:

Provided further that in a case where the factor relevant to the production is altered or modified at any time during the year, the annual production shall be redetermined on a proportionate basis having regard to such alteration or modification.

**(3)** The duty of excise on notified goods shall be levied at such rate, on the unit of production or, as the case may be, on such factor relevant to the production, as the Central Government may, by notification in the Official Gazette specify, and collected in such manner as may be prescribed:

Provided that, where a factory producing notified goods did not produce the notified goods during any continuous period of fifteen days or more, duty calculated on a proportionate basis shall be abated in respect of such period if the manufacturer of such goods fulfils such conditions as may be prescribed.

**(4)** Where an assessee claims that the actual production of notified goods in his factory is lower than the production determined under sub-section (2), Central Excise Officer not below the rank of Joint Commissioner of Central Excise, shall, after giving an opportunity to the assessee to produce evidence in support of his claim, determine the actual production and redetermine the amount of duty payable by the assessee with reference to such actual production at the rate specified in sub-section (3).

**(5) W**here the Central Excise Officer not below the rank of Joint Commissioner of Central Excise determines the actual production under sub-section (4), the amount of duty already paid, if any, shall be adjusted against the duty so redetermined and if the duty already paid falls short of, or is in excess of, the duty so redetermined, the assessee shall pay the deficiency or be entitled to a refund, as the case may be.

> **(6)** The provisions of this section shall not apply to goods produced or manufactured -
>
> (i) in a free-trade zone and brought to any other place in India, or
>
> (ii) by a hundred per cent export-oriented undertaking and allowed to be sold in India.
>
> Explanation 1 – For the removal of doubts, it is hereby clarified that for the purposes of Section 3 of the Customs Tariff Act, 1975 (51 of 1975), the duty of excise leviable on the notified goods shall be deemed to be the duty of excise leviable on such goods under the First Schedule and the second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), read with any notification for the time being in force.
> Explanation 2 – For the purposes of this section the expressions 'free trade zone' and 'hundred per cent export-oriented undertaking' shall have the meanings assigned to them in section 3."

The above provision was inserted in the Act by Finance Act 2 of 1997 with effect from 1.9.1997. The said provision provided for levy of excise duty by determining capacity of production of notified goods as against levy of excise duty on value of goods under section 3 of the Act. The provision was later omitted w.e.f 11.5.2001 by Finance Act 2001. Rules framed with reference to the provision also provided for payment of excise duty on lump sum basis and the said scheme was applicable on furnishing of an option by the assessee. The provision was upheld by the Andhra Pradesh High Court in **Sarwotham Ispat limited v. Government of India,** 1999 (105) ELT 550. The matter was also considered by the Hon'ble Supreme Court in **Commissioner of C.Ex.& Customs v. Venus Castings (P) Limited,** 2000 (117) ELT 273. It was observed:-

> "11.....What can be seen is that the charge under the Section is clearly on production of the goods but the measure of tax is dependent on either actual production of goods or on some other basis. The incidence of tax is, therefore, on the production of goods. It cannot be said that collection of tax based on the annual furnace capacity is not relatable to the production of goods and does not carry the purpose of the Act. In holding whether a relevant rule to be ultra vires it becomes necessary to take into consideration the purpose of the enactment as a

whole, starting from the preamble to the last provision thereto. If the entire enactment is read as a whole indicates the purpose and that purpose is carried out by the rules, the same cannot be stated to be ultra vires of the provisions of the enactment. Therefore, it is made clear that the manufacturers, if they have availed of procedure under Rule 96ZO(3) at their option, cannot claim the benefit of determination of production capacity under Section 3A(4) of the Act which is specifically excluded. We find that the view taken by the Andhra Pradesh high Court in Sathawahana Steels & Alloys (P) Ltd. v. Government of India (supra) and the similar view expressed by the Division bench of the Allahabad High Court in Civil Miscellaneous Writ Petition No.1127 of 1999 M/s Jalan Castings (P) Ltd. v. Commissioner of Central Excise & Ors. disposed of on February 28, 2000 is reasonable and correct. We overrule the view taken by the Allahabad High Court in Pravesh castings (P) Ltd. Kanpur Nagar v. Commissioner of Central excise, Allahabad & another (supra).

12.On the reasoning adopted by us and bearing in mind that in taxation measures composition schemes are not unknown and when such scheme is availed of by the assessee it is not at all permissible for him to turn around and ask for regular assessment, we think, there is no substance in the contention urged on behalf of the respondents."

Thereafter, in **Union of India v. Supreme Steels and General Mills,** 2001 (133) ELT 513, it was observed:-

"3.....It was absolutely optional for the manufacturer to opt for payment of excise duty in accordance with sub-rule 3 of Rule 96ZO on the basis of total furnace capacity installed as provided therein. The manufacturer cannot opt twice during one financial year first choosing to pay in accordance with sub-rule 3 of Rule 96ZO and thereafter to switch over to actual production basis under Section 3A(4) of the Act, in case it is less than the duty payable under sub-rule 3 of Rule 96ZO. The said sub rule is quite clear that the option under it is available subject to the condition that once having opted for it, benefit if any under sub-s. (4) of Section 3A of the Central Excise Act, 1944 shall not be available. We find that the controversy sought to be raised stands finally settled by a decision of this Court reported in JT 2000 (4) SC 77 – Commissioner of Central Excise & Customs v. M/S Venus Castings (P) Ltd. It has been clearly held that two procedures namely one as provided under sub-s (4) of Section 3A of the Central Excise Act and the other as provided under sub-rule 3 of Rule 96ZO of

> Central Excise Rules are alternative procedures and the assessee has to opt for one. Once having done so he cannot claim the benefit of the other.
>
> 4. In view of what has been indicated above in this order all the cases of the bunch stand finally disposed of accordingly. Costs easy."

**Re:Q.No.i**

Contention on behalf of the petitioner is that on deletion of the provisions of Section 3-A of the Act from the Statute Book, interest on the excise duty payable under the said provision could not be recovered as omission of the said provision wiped out the liability of the assessee, even for the period during which the said provision was in force. This contention is based on judgments of the Hon'ble Supreme Court in **Messrs Rayala Corporation**'s case and **Kolhapur Canesugar'**s case (supra).

In the present case, we are not concerned with omission of rule or omission/expiry of a "temporary statute". In **Messrs Rayala Corporation**'s case (supra), the issue arose in the context of quashing of proceedings under Rule 132-A of the Defence of India Rules. The contention raised was that the rule having been omitted on 30.3.1965, prosecution or offence under the said rule could not be instituted on 17.3.1968 when the rule had ceased to exist. (Para 3 of the judgment). Reliance was placed on judgment of the Hon'ble Supreme Court in **S.Krishnan and others v. The State of Madras**, 1951 SCR 621, to the effect that:

> "The general rule in regard to a temporary statute is that, in the absence of special provision to the contrary, proceedings which are being taken against a person under it will ipso facto terminate as soon as the statute expires."

After considering the relevant law on the point, it was concluded in para 17 as under:-

> "17.....In the case before us, Section 6 of the General Clauses Act cannot obviously apply on the omission of Rule 132-A of the D.I.Rs for the two obvious reasons that Section 6 only applies to repeals and not to omissions, and applies when the repeal is of a Central Act or Regulation and not of a rule. If Section 6 of the General

> Clauses Act had been applied, no doubt this complaint against the two accused for the offence punishable under Rule 132-A of the D.I.Rs could have been instituted even after the repeal of that rule."

Thus, following principles were laid down:-

(i) Section 6 applied to repeals and not to omissions;

(ii) Section 6 aforesaid was applicable to repeal of a Central Act or a Regulation and not to repeal of a rule;

In **Kolhapur Canesugar's** case (supra), the question was considered in the context of omission of a rule and it was held that to such a situation, Section 6 of the General Clauses Act, 1897 was not applicable. In the present case, we are neither concerned with a temporary statute nor concerned with omission of a rule.

In ***District Mining Officer and others v. Tata Iron and Steel Co. and another*** AIR 2001 Supreme Court 3134, the question as to what is a "temporary statute", was examined and it was observed:

> "19..... A Statute can be said to be either perpetual or temporary. It is perpetual when no time is fixed for its duration and such a statute remains in force until its repeal which may be express or implied. But a Statute is temporary when its duration is only for a specified time and such a Statute expires on the expiry of the specified time, unless it is repealed earlier .....Admittedly, to a temporary Statute, the provisions of Section 6 of the General Clauses Act, 1897 will have no application .....A temporary Statute even in the absence of a saving provision like Section 6 of the General Clauses Act may not be construed dead for al purposes and the effect of expiry is essentially one of the construction of the Act....."

The question whether omission of a provision is at par with repeal of a provision, was considered by the Hon'ble Supreme Court in **M/s. General Finance Co. and another v. Assistant Commissioner of Income Tax, Punjab,** AIR 2002 SC 3126 and it was observed that though, there was substance in the argument that omission should also be treated at par with repeal, the matter could be referred to larger bench in an appropriate

case.

We may also refer to judgments of the Hon'ble Supreme Court in **State of Punjab v. Harnek Singh,** AIR 2002 SC 1074, **M.S.Shivananda v. Karnataka State Road Transport Corporation**, AIR 1980 SC 77, **State of Punjab v. Mohar Singh,** AIR 1955 SC 84 and **M/s. Ambalal Sarabhai Enterprises Limited v. M/s. Amrit Lal & Co. and another,** AIR 2001 SC 3580, wherein question of effect of omission or repeal has been examined.

We, however, need not go into the question in further detail as we find that vide Section 131 of the Finance Act 2001, Section 38-A was added to the Central Excise Act, 1944, to the following effect:-

> "38A.Effect of amendments, etc., of rules, notifications or orders. - Where any rule, notification or order made or issued under this Act or any notification or order issued under such rule, is amended, repealed, superseded or rescinded, then, unless a different intention appears, such amendment, repeal, supersession or rescinding shall not-
>
> (a) revive anything not in force or existing at the time at which the amendment, repeal, supersession or rescinding takes effect; or
> (b) affect the previous operation of any rule, notification or order so amended, repealed, superseded or rescinded or anything duly done or suffered thereunder; or
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any rule, notification or order so amended, repealed, superseded or rescinded; or
>
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under or in violation of any rule, notification or order so amended, repealed, superseded or rescinded; or
>
> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or

> punishment may be imposed as if the rule, notification or order, as the case may be, had not been amended, repealed, superseded or rescinded".

Thus, even by omission of section 3-A, liability of the assessee incurred thereunder was not wiped out.

The question is, accordingly, answered against the petitioner.

**Re:Q.No.ii**

In **Citedal Fine Pharmaceuticals**'s case (supra), the question was as to validity of Rule 12 of the Medicinal Toilet Preparations (Excise Duties) Rules, 1956, which provided for recovery of deficiency in duty without specifying any time limit. It was observed that even in absence of period of limitation, power of recovery had to be exercised within a reasonable period and question of reasonable period had to be decided in the facts and circumstances of each case.

In **Kanhai Ram Thekedar**'s case (supra), in the order of original assessment, no demand of interest was raised. The assessee paid the assessed amount and after a period of four years, demand of interest was raised. It was held that limitation of three years had been laid down for rectification and demand of interest after four years was not within the reasonable time. In the present case, the assessee undertook to pay the amount with interest and upto 31.3.2003, last payment was made. Thereafter, demand was raised by the department on 19.8.2005. In the circumstances, the demand could not be held to be beyond reasonable time.

The question has, thus, to be answered against the petitioner.

In view of the above conclusions, the writ petition is dismissed.

(Adarsh Kumar Goel)
Judge

October 30, 2006 (Rajesh Bindal)
'gs' Judge